**ZAINAP BTE ABD. MAJID & 6 ORS.**

**v.**

**GAN ENG HWA & 3 ORS.**

HIGH COURT MALAYA, MUAR
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO.25-20-1988]
27 SEPTEMBER 1994

***TORT: Negligence - Road accident - Collision from opposite directions - Motorcar encroaching into path of bus - Lorry parked on motorcar's side of the road - Whether an obstruction - Whether lorry owner and driver liable for nuisance and/or negligence - Evidence of witnesses corroborated by police sketch plan and photographs.***

This was a claim by the plaintiffs for damages arising from a collision between a motorcar in which several of the plaintiffs were passengers and a motorbus(the express), driven and owned by the 3rd and 4th defendants respectively, while the vehicles were travelling in opposite directions along the Muar-Batu Pahat road.

The plaintiffs' claimed that the 1st defendant, the driver of a lorry when loading oil palm fruit had negligently obstructed the road by parking the lorry on the wrong side of the road against the flow of traffic. They further claimed that the driver of the express was negligent in speeding, failing to keep a proper lookout and to take steps to avoid the collision. The lorry driver's and the driver of the express made similar pleadings of negligence against each other and the driver of the motorcar.

It was undisputed that the collision occurred on a dry straight stretch of the main road and visibility was good. Apparently, the motorcar first overtook a Fiat, then an express bus (the Muar Express) and moved behind a Mercedes and then pulled out into the right of way of the express. The sketch plan disclosed the brake marks of the motorcar at 99 feet in length and the photographs showed extensive damage to both vehicles, particularly the motorcar. The principal question on the issue of negligence was the position of the lorry at the material time which according to four witnesses was parked on the road.

**Held:**

**[1]** The motorcar was being driven at an excessive speed in the circumstances. The driver failed to ascertain that the situation was safe before he overtook the Muar Express.He should have waited for the Mercedes to complete the manoeuvre of overtaking, then ascertained whether or not it was safe for him to overtake. Unfortunately the Mercedes had to stop suddenly because the lorry was blocking its path and the motorcar not being able to stop in time to avoid colliding into the rear of the Mercedes made the fatal mistake of pulling out into the path of the oncoming express whose driver was not negligent at all. In the circumstances, the driver of the motorcar was negligent.

**[2]** Parking the lorry on the road in the way he did obstructed the road and caused it to be a danger to other road users. The lorry was also facing the wrong way which in an emergency such as that faced by the driver of the motorcar, could have caused him to become confused and make the wrong decision which he in fact made. In

addition the lorry driver should have reasonably foreseen that a collision would occur and therefore had the duty to take reasonable care to avoid it. It is trite law that an alternative claim in negligence and nuisance is permissible and accordingly the lorry driver and owner was liable in both negligence and nuisance.

**[3]** The 1st and 2nd defendants, the lorry driver and owner respectively, and the driver of the motorcar were equally liable for the collision.

*[Judgment entered against 1st and 2nd defendants for 50% of the plaintiffs' claim].*

**Cases referred to:**
*Lim Kar Bee v Abdul Latif bin Ismail [1978] 1 MLJ 109* ***(foll)***
*Chan Loo Khee v Lai Siew San & Ors. [1971] 1 MLJ 253* ***(refd)***
*Chop Seng Heng v. Thevannasan [1976] RTR 193* ***(foll)***
*Donoghue v Stevenson [1932] A.C. 562 p. 580* ***(foll)***
*Lloyds Bank Ltd v Budd and Others [1982] RTR 80* ***(refd)***

*For the plaintiffs - E. Ramasamy; M/s. E. Ramasamy & Co.*
*For the 1st & 2nd defendant - K.S. Dass; M/s. K. Sila Dass & Partners*
*For the 3rd & 4th defendant - R.A. Kumar; M/s. Varughese & Co.*

## JUDGMENT

**Richard Talalla J:**
On 7 July 1985 at 3.30 pm one Encik Taib was driving a motorcar (the motorcar) along the Muar - Batu Pahat road in the direction of Muar and came into collision (the collision) with a motor bus (the express) driven and owned by the 3rd and 4th defendants respectively, which was proceeding towards Batu Pahat. As a result of the collision Encik Taib and 3 of his passengers were killed while 2 other passengers in Encik Taib's motorcar were injured resulting in the plaintiffs suffering consequential and continuing loss and damage. The 1st and 2nd defendants were the driver and owner respectively of a lorry (the lorry). The foregoing facts, apart from being pleaded by plaintiffs, were agreed, these facts having been distilled from a statement of agreed facts.

The plaintiffs claimed damages against all four defendants alleging *inter alia* that the collision was caused by the negligence of the lorry driver or the driver of the express or both of them.

The plaintiffs' pleaded case was *inter alia* that the lorry driver when loading oil palm fruit had negligently parked the lorry on the wrong side of the road, against the flow of traffic, without any traffic sign to warn other road users of the situation and in so doing he wrongfully obstructed the road, caused the lorry to become a danger to such road users and a nuisance on the road all of which resulted in the motorcar colliding with the express. The plaintiff pleaded further or in the alternative that the driver of the express was negligent in failing to keep a proper look out and to take steps to avoid the collision and speeding. The lorry driver pleaded that the collision was caused by Encik Taib, claiming that he drove too fast, did not keep a proper look out, encroached into the path of and failed to take steps to avoid colliding with the express. The lorry driver's pleading against the driver of the express was similar to the plaintiffs' claim against the same. The driver of the express in turn pleaded negligence against Encik Taib and the lorry driver respectively as the lorry driver pleaded against Encik Taib and as the plaintiffs claimed against the lorry driver.

The police sketch plan and key and photographs were agreed without the maker or photographer being called, all the defendants agreeing with the contents of the sketch plan as representing the situation when the plan was made but the plaintiffs and driver and owner of the express contending that the lorry was not as represented in the sketch plan at time of collision but was on the metal road at that time and placed in the position represented in the sketch plan after the collision.

It was agreed that a principal question on the issue of negligence was the position of the lorry at the time of collision. If at the time of collision the lorry was on the side table as indicated in the sketch plan the plaintiffs and the driver and owner of the express conceded that the driver and owner of the lorry were not liable at all. If on the other hand the lorry was on the road at the time of the collision then it was the argument of the plaintiffs and the driver and owner of the express that the lorry driver was wholly or contributorily liable for the accident whereas the driver and owner of the lorry contended that even if the lorry was on the road at the time of the accident, that position of the lorry did not contribute to the accident and therefore in any event they were not liable. The drivers of the Fiat, the Muar Express, the lorry and the express all gave evidence as did a motorcyclist who was following the express, these five persons being the only persons who testified at the trial of this action.

The undisputed and unchallenged evidence emanating from these witnesses was that the collision occurred on a straight stretch of the main road which was dry and visibility was good, that proceeding in the same direction and in front of Encik Taib's motorcar which was a Fiat 131 was a Fiat 132 motorcar (the Fiat) which in turn was following a motor bus (the Muar Express) which in turn was following a Mercedes motorcar (the Mercedes) and in front of the Mercedes was the lorry, that Encik Tiab first overtook the Fiat, then the Muar Express, then cut in front of the Muar Express behind the Mercedes and then pulled out to the right into the right of way of the oncoming express and collided with the express.

I shall deal with the said principal question and the evidence generally by referring to the evidence of the witnesses *seriatim*.

PW1 was the driver of the Fiat. He testified to the lorry being parked on the road facing Batu Pahat and the lorry having taken up three quarters of that part of the road between the edge of the road and the dividing white line. This witness had parked his car after the collision and on alighting discovered that the lorry had already been parked on the side table. Counsel for the lorry driver sought to establish that PW1 the driver of the Fiat was a partisan witness being a friend of Encik Taib and cross examined him to that effect. PW1 answered candidly that he had known Encik Taib before the accident for a period of 3 years and that they were good friends but not related. It was suggested to PW1 that PW1 and Encik Taib had been racing but the witness denied that. I rejected any suggestion of racing which I consider to have been an afterthought of the lorry driver for it was not even pleaded that PW1 and Encik Taib had been racing. With the exception of the testimony of the lorry driver, the evidence of PW1 fitted in and was corroborated by the testimony of the other witnesses, by and large. The lorry driver testified that the Fiat and the motorcar were running parallel. Of course they were at one stage. That was when Encik Taib overtook the Fiat. Nothing sinister is to be deduced from that fact. In any event the part that PW1 played in the episode was of no relevance. PW1 had

given way to Encik Taib who overtook the Fiat and then went on to overtake the Muar Express. Accordingly negotiation with and the participation of the Fiat was a *fait accompli*. PW1 testified that the speed of the motorcar was more or less 50 m.p.h.

PW2 was the motorcyclist. He testified that the wheel of the lorry was on the road beside a heap of oil palm fruit, that not many minutes after the accident occurred the driver reversed the lorry to the shoulder of the road and that the express and the motorcar were situated after the accident to the left of the road. This witness did not see the accident because his view was obstructed by the express. I had no reason to disbelieve this witness. I accepted him as a witness of truth.

The next witness was the lorry driver. He told a different story. He insisted that the lorry was parked on the side table and not on the road at all. I did not believe him. It was he who was a partisan witness. He had every reason to say that the lorry was not on the road when it was so. What was more I believe he reversed the lorry onto the side table immediately after the collision. I find so, because he testified that the fruit branches were at the back of the lorry but that was not as depicted in the sketch plan. More of this later.

The fourth witness was the driver of the express. The sequence of events leading up to the collision and that event itself unfolded before his very eyes. When he saw the motorcar overtaking the Muar Express he took his foot off the accelerator and was ready to apply the brake. The motorcar overtook the Muar Express and cut in front of it. The Mercedes had come to a halt having been obstructed by the lorry. The motorcar thereafter suddenly pulled out again and it is then that an emergency arose. As the witness himself testified, it all happened in the twinkling of an eye. He braked and swerved to the left but it was too late. Some 40 minutes after the accident this witness made a police report saying very much the same as he said in evidence. I accepted him as a witness of truth and I found him not to be negligent at all. This witness said that three quarters of the lorry was on the road and the remaining quarter on the grass and that when he alighted the lorry was in the course of being reversed.

The last witness was the driver of the Muar Express. This witness too testified that the whole of the lorry was on the road. This witness also saw the collision and the events building up to it. He said that the lorry was 200 yards or more from him, about 4 or 5 lamp posts away. He was not sure whether there were vehicles behind him. He saw from afar a bus proceeding in the direction of Batu Pahat. This was no doubt the express. A car overtook his bus. When the car was alongside the bus it sounded its horn. The car proceeded into the space in front of the bus. Because the bus and the car were moving the car had reached close to the lorry. Suddenly the Mercedes came to an immediate stop. This witness felt that the motorcar that had overtaken him in seeking to avoid colliding into the rear of the Mercedes straightaway proceeded to the right of the road but by that time the express had reached and immediately the collision occurred. This witness said that upon his bus being overtaken he slowed down the bus. I accepted him as a witness of truth. This witness testified that he knew the driver of the express before the accident because they both worked under the same employer. I drew no adverse inference from this fact; neither did Counsel for any of the parties.

As is usual in accident cases it is the police sketch plan with its key and photographs that reveal the truth. That plan disclosed the brake marks of the motorcar as having a length of 99 feet. The photographs showed the damage to the express and the motorcar and especially the motorcar to be extensive. Upon a combination of these two features in particular and a consideration of the evidence as a whole I found that the motorcar was being driven at an excessive speed in the circumstances. I also found that Encik Taib failed to ascertain that the situation was safe before he overtook the Muar Express. He should have waited for the Mercedes to complete the manoeuvre of overtaking, then ascertained whether or not it was safe for him to overtake and having done so and been quite sure that it was safe to carry out the manoeuvre, then and then only, should he have proceeded to overtake. Instead he carried on headlong behind the Mercedes hoping everything would be alright and that he could follow through to the correct side of the road in front of the Muar Express and still behind the Mercedes in time to let the oncoming express pass through. Unfortunately the Mercedes had to stop suddenly because the lorry was blocking its path. Obviously Encik Taib was proceeding fast and could not stop in time to avoid colliding into the rear of the Mercedes. It must all have happened in a matter of seconds and in that limited time he made the fatal decision to pull out into the face of the oncoming express. In the circumstances I found Encik Taib to be negligent.

As to the driver of the lorry there were four witnesses who testified to the lorry being on the road and of these four witnesses all but one said the whole of the lorry was parked on the road. I accepted that as a fact. That was the probability seeing that the oil palm fruit were lying on the side table awaiting loading. I also believe that the driver of the lorry reversed it onto the side table after the collision. The evidence in this regard is corroborated by the sketch plan which showed the fruit in front of the lorry which is hardly the right location for loading onto the lorry, the best position for loading being along the flank.

I found that by parking the lorry on the road in the way he did he so obstructed the road as to cause it to be a danger to other road users. Not only did the lorry obstruct the right of way of users of this main road coming from the direction of Batu Pahat in the direction of Muar but also the lorry was facing the wrong way which in an emergency such as Encik Taib faced could have caused him to become confused and make the wrong decision which he in fact made. My finding was based on the judgment of Raja Azlan Shah F.J., as he then was, supported by Gill C.J. in *Lim Kar Bee v Abdul Latif bin Ismail* [1978] 1 MLJ 109. On that authority I found the lorry driver liable in nuisance to the plaintiffs. In that case the respondent had claimed damages for personal injuries as a result of accident on a road. The respondent's case was that in trying to avoid a child crossing the road about 10 feet ahead of him he swerved his motorcycle to the left and in so doing crashed into a 32 inch steel pipe which had been left lying about 3 feet to 4 feet from the near side of the road for the past one or two years.The pipe had a sharp steel-rim edge exposed and that constituted, as the learned trial Judge held, a potential danger to road users. The claim was founded on negligence or alternatively nuisance. The trial Judge held that on both issues the defendant was wholly to blame. The learned Judge abovestated dismissed the appeal. Ong Hock Sim FJ dissented on the ground that the pipe was off the road, in a place not meant for use by vehicles; not so in this case where the lorry was smack on the main road between Batu Pahat and Muar, so that even the

dissenting judgment in *Lim Kar Bee's* case supports the plaintiffs action in the tort of nuisance against the lorry driver. On the evidence of this defendant himself the lorry was there for about two hours before the collision took place. I also found the lorry driver to be negligent in doing what he did. It is trite law that an alternative claim in negligence and nuisance is permissible. See Raja Azlan Shah F J *ibid* at page 116. As to the finding of negligence I followed the dissenting judgment of Ong C.J. in *Chan Loo Khee v Lai Siew San & Ors.* [1971] 1 MLJ 253, as applied by the Privy Council in *Chop Seng Heng v. Thevannasan* [1976] RTR 193 as indeed I followed the latter case. In Chan's case three motorcars were involved in an accident near Tanjong Malim where the road was straight and of good width. One of the cars was a Volkswagen driven by a schoolmaster who was returning home after a holiday in Kuala Lumpur. The second car was an Opel proceeding in the opposite direction towards Kuala Lumpur. The third car was a Fiat bound for Kuala Lumpur which the trial Judge found as a fact to be stationary on the carriage-way at the time of the accident. The learned trial Judge found that the Fiat was so parked with its side lights on, but held that "in this position and in the circumstances of the accident, it could not and did not constitute such an obstruction to the Opel as to have contributed to the accident." He found the driver of the Opel wholly to blame for the accident and dismissed the claim for contribution by the driver of the Opel against the driver and owner respectively of the Fiat as third parties. On appeal which was dismissed by Gill and Ali F.JJ., Ong C.J. in his dissenting judgment said at pages 254 and 255:

> If parking a car, however recklessly, so as to cause needless obstruction to other road-users, were to be held blameless, merely because other motorists could still have room to pass, **provided they kept a proper lock-out**, then it would appear that the deliberate parking of a car anywhere, even in the middle of the highway, should be considered equally excusable, if not justifiable, regardless of the fact that, by reason of such obstruction, other motorists had come to grief by reason of their being not fully alert. In such cases there should, in my opinion, be proper apportionment of blame, depending on the circumstances. But, to exonerate the obstructionist completely - when it is undeniable that, but for the presence of the obstruction, there could not possibly have been an accident - is to ignore the principle of placing the blame fairly on those to be blamed for their acts or omissions. In this age of fast motor transport I think it is the duty of the Courts to eschew excessive legalism and to require that every motorist should observe the golden rule of shewing due consideration for other road-users, or suffer the consequences of his failure to do so.

This general principle enunciated by Ong C.J. was emphatically approved by Lord Edmund-Davies at page 198 of *Chop Seng Heng's* case. In that case, the first defendant was driving a lorry along a winding road at 3 am when visibility was somewhat reduced by mist; after rounding a blind left-hand bend, and some 30 feet from its exit, he parked the lorry on its correct side with the lights on and the off side flasher working, and leaving ample room on the road for a vehicle to overtake safely. A vehicle, travelling in the same direction with the plaintiff as passenger, rounded the bend at 35 mph and crashed into the rear of the parked lorry, and he sustained injuries. He claimed damages for personal injuries caused by the negligence of the first defendant and the second defendants, who owned the stationary lorry, and the driver, the third defendant, and the owner, the fourth defendant, of the vehicle in which the plaintiff was a passenger. The trial Judge found that 75 per cent of the cause of the accident was that the lorry was parked too close to the bend and that

the third and fourth defendants had contributed 25 per cent to the accident by the speed at which the vehicle had been driven round the bend. On appeal by the first and second defendants and cross-appeal by the fourth defendant, the Federal Court accepted the primary findings of the trial Judge but, by a majority, allowed the appeal and dismissed the cross-appeal, holding that the first defendant was not guilty of negligence merely because he parked too close to the exit of the bend and that the fourth defendant was solely liable for the accident. The Privy Council held that the first and second defendants were rightly blamed in part for the accident and since the trial Judge had not misdirected himself on matters of fact and no error of principle had been established his apportionment of liability should be restored.

In this case the record discloses Counsel for the lorry driver in his final speech citing the 2 authorities last stated and agreeing that I should follow the principle abovestated as approved by the Privy Council but arguing that the present case is distinguishable on the facts because here the accident happened in broad daylight.

If it was being suggested that in applying the said principle and making a finding of negligence or otherwise claims should be compartmentalised between those happening at night and those happening in the daytime, the suggestion was declined. There can be no rule of thumb. Every case has to be decided on its own facts and according to the circumstances pertaining to it. Accordingly I did so. I found that the lorry was parked on the road needlessly and selfishly and, as I have already said, in such a way as to cause obstruction to other road users and danger to them. I should add that the lorry driver should reasonably have forseen that a collision such as that which actually happened, would occur and therefore he had a duty to take reasonable care to avoid it.See the famous test of Lord Atkin in *Donoghue v Stevenson* [1932] A.C. 562 at page 580. To put it in common parlance, any person with common sense would not have parked the lorry on the Batu Pahat/Muar main road, day or night, facing the wrong way. It was a crassly stupid thing to do.

*Lloyds Bank Ltd v Budd and Others* [1982] RTR 80 was a case arising from a 'pile-up' of vehicles one foggy morning in 1975 on the A1 in England. The night before a Scammell lorry had broken down. The driver drove it into a lay-by and left it there overnight. The next morning together with a fitter an attempt was made to drive the lorry to a more convenient place for repairs but unfortunately it broke down again in the near side lane of the carriageway. A Granada car rammed into the back of another heavy vehicle and then a lorry crashed on to the Granada killing the driver and passenger in the car. The learned trial Judge found the driver of the Scammell not to be liable. In other words, as Lord Denning M.R. was later to say, he found that the nuisance or the negligence of the Scammel driver was too remote to be a cause of the eventual 'pile-up'. On appeal Lord Denning made reference to the principles laid down in *Harvey v. Road Haulage Executive* [1952] 1 KB 120 and *Rouse v. Squires* [1973] RTR 550 and said at page 83

> Applying the principles laid down in the two cases, there is no doubt whatever that the broken down lorry - which was obstructing the carriageway - put the oncoming vehicles into peril: and it was, at least, a contributory cause of the accident. It was not necessarily the sole cause: but it was one of the causes. The negligence of the oncoming lorry was another of the causes. Nevertheless, in a case of this kind the vehicle which is obstructing the carriageway - by negligence and nuisance - is also to blame. If it were not there, there might be no `pile-up' at all: and there might be no serious accident.

Leaving a vehicle on the road in circumstances such as occurred in the cases abovestated was a veritable trap; so in this instance. In my opinion the lorry driver by parking the lorry on the road and on the wrong side likewise set a trap for overtaking vehicles proceeding in the direction of Muar as evidenced by the Mercedes having to brake heavily on suddenly coming upon the lorry leaving the hapless Encik Taib with no chance of escape.

For the reasons abovestated I held the lorry driver and owner on the one part and Encik Taib on the other part equally liable for the collision and gave judgment accordingly.